THILAGAVATHI SUPPRAMANIAM

v.

CHANDRAN RAMAN

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[DIVORCE PETITION NO: 33-152-2000]
25 JANUARY 2002

FAMILY LAW: *Children - Custody - Maintenance - Factors for consideration - Children aged below seven years - Whether custody to be given to the mother - Law Reform (Marriage and Divorce) Act 1976, ss. 78, 88*

This was an application by the petitioner for the custody and maintenance of her two children, a boy aged six years and a girl aged four years. The facts showed that the petitioner had parted ways with her respondent husband sometime in December 1998, and thereafter left the matrimonial home together with the children to stay with her parents. In February 1999, however, the respondent forcibly took away the son to live with him and his mother at the latter's house, and ever since, the son had been staying with the respondent and his mother. At the hearing herein, the respondent urged the court not to disturb the *status quo*, as the son was happy in the present environment and as interference might cause serious harm to the child emotionally and physically. It was not in dispute that at the interview with the learned judge, the son gave an indication that he preferred to stay with the respondent rather than the petitioner. The primary issue that arose was whether considering the welfare and age of the children custody ought to be given to the petitioner.

Held:

[1] The paramount consideration on the issue of custody is always the welfare of the child. This apart, the court must not lose sight of the rebuttable presumption in s. 88 Law Reform (Marriage & Divorce) Act 1976 ('the Act') that it is for the good of the child below the age of seven years to be with the mother. (p 73 h-i)

[2] Although the court cannot be oblivious to the *status quo* factor, nevertheless, it is a factor that falls subordinate to the factor of the welfare of the children. In the premises, the factor of uprooting from an existing environment and its adverse effects cannot be given too much weight, more so when the perspective that the court should adopt is 'whether the child should be deprived of the love, care and devotion of his natural mother, considering his tender age'. (p 75 d-e & h-i)

[3] The evidence as presented does not in any way suggest that the petitioner is an unsuitable or uncaring mother, and so the presumption in s. 88 of the Act must operate in full force. Consequently, custody of the children is awarded to the petitioner with access to the respondent to visit the children twice weekly. (pp 74 f & 76 c)

[4] Considering the fact that the respondent is earning RM500-600 a month, and the factors for consideration as laid out in s. 78 of the Act, RM400 a month would be a reasonable amount for the maintenance of the petitioner and the two children. (p 76 g-h)

[Application allowed; order accordingly.]

Case(s) referred to:
K Shanta Kumari v. Vijayan [1986] 2 MLJ 216 ***(foll)***
Kalyani Subramaniam v. Mahalingam Padavettan [1997] 3 CLJ Supp 439 ***(foll)***
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 ***(refd)***
Re B [1962] 1 All ER 872 ***(refd)***
Re K (Minors) [1977] Fam 179 ***(foll)***
Re Ko (an infant) [1990] 1 MLJ 495 ***(foll)***
Re Thain [1926] Ch 676 ***(refd)***

Legislation referred to:
Law Reform (Marriage & Divorce Act) 1976, ss. 77, 78, 88, 93

Other source(s) referred to:
Bromley's Family Law, 7th edn, p 327

For the petitioner - J Chandrika; M/s John Ang & Jega
For the respondent - Rafie Shazwan; M/s RR Mahendran & Co

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:

The application before the court relates to the ancillary prayer by the petitioner for custody of both the children, a boy by the name of Sujendran a/l Chandran aged six presently staying with respondent and a girl Sharmila a/p Chandran aged four presently staying with petitioner and for maintenance for herself and the two children in the sum of RM1,000 per month.

The evidence relating to the application was in the form of oral evidence on oath given by both the petitioner and the respondent and the interview I conducted on the boy Sujendran a/l Chandran with the assistance of the Indian interpreter and in the presence of both the petitioner and the respondent and their respective counsel.

The relevant piece of evidence deduced was that the son only stayed with the parents for about three years at the respondent's parent's place in Skudai before they parted ways on 16 December 1998 when the petitioner left the matrimonial home together with both children and stayed with her parents.

The reason for leaving according to the petitioner is because of the accusation by the respondent's mother that the petitioner was having an affair with the respondent's father. However the physical contact with her son was short-lived for 1 1/2 months after parting ways, sometime in February 1999 the respondent took the son forcibly away without her permission to the respondent's mother's place and the son has been staying there with the respondent ever since.

The petitioner made several attempts which ended in futility and insults and abuse. She sought the assistance of the police and obtained temporary reprieve of only being in physical contact for a short while and even that in the presence of the police. That temporary reprieve proved the last occasion that the petitioner had contact with her son for subsequently the respondent and his mother moved residence to Kulai and thereafter to Labis where it became more difficult for her to gain access to the son. Evidence has been led that during the initial three years of marriage the respondent's mother took care of the son when she was at work and she tended to the son when she came back from work and the son slept with her at night. Though applying for custody she was prepared to give liberal access over both the children to the respondent. Respondent on the other hand in the evidence adduced by him is full of spite and the resistance is more to spite the petitioner for refusing him access to the son during the son's 1 1/2 month stay with the petitioner at the petitioner's parent's place and also the daughter. He refuses to grant access over the son to the petitioner.

In my interview with the boy I found him to be rather intelligent for his age. He answered the question posed rather confidently and the negative replies given to whether he wanted to stay with the petitioner in my view is attributable to the long continued stay with respondent which invariably has a marked influence over the boy. It is with the object of neutralising the uneven influence occasioned by the son's prolonged stay with the respondent and his mother that I made an interim order for access for the respondent to bring the son every Friday before 6pm to stay with the petitioner until Sunday 3pm every week commencing from 17 August 2000 until final determination of the custody issue herein. I have been made to understand that there was no compliance of the interim order aforesaid.

Having sifted through the evidence as presented it now behoves on me to go through the law pertaining to the subject of custody and apply the same to determine as whether the petitioner has adequately made out a case for the custody of both the children to be made in her favour. The subject of custody would invariably invite an appraisal of Part VIII of the Law Reform (Marriage & Divorce Act) 1976 (hereinafter referred to as the Act). The paramount consideration on the issue of custody is always the welfare of the child and there is the rebuttable presumption that it is for the good of a child below the age of seven years to be with his/her mother and this is specifically provided for by s. 88 thereof which states:

1) The court may at any time by order place a child in the custody of his or her father or his or her mother…

2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

a) to the wishes of the parents of the child; and

b) to the wishes of the child, where he or she is of an age to express an independent opinion.

3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by charges of custody.

In *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189 Raja Azlan Shah CJ (as His Majesty then was) in delivering the judgment of the Federal Court stated at p. 193:

> In short the learned judge has given the overriding consideration of the welfare of the children uppermost in his mind. That, we think, is the correct approach. We would state categorically that that must be the first and paramount consideration and other considerations must be subordinate.

In taking stock of the paramount consideration of the child's welfare the court must not lose perspective of the applicability of the presumption in favour of the mother in respect of both the children herein who are under seven years. The evidence as presented and deducible does not in any way suggest that the petitioner is unsuitable and/or uncaring mother and hence the presumption operates in full force and effect in favour of the mother. As was aptly put by Donovan LJ in *Re B* [1962] 1 All ER 872 (which case was referred to by Zaleha Zahari J in *Kalyani Subramaniam v. Mahalingam Padavettan* [1997] 3 CLJ Supp 439):

> *Prima facie* a child of this age ought to remain with his mother and strong grounds are required to justify taking it away. I agree that there is no rule of law to that effect but certainly it is the natural law and one that should if possible prevail.

Sir John Pennyquick in *Re K (Minors)* [1977] Fam. 179 echoed the same sentiments in favour of the mother when he stated "the court will not deny reality that a mother not as a matter of law but in the ordinary course of nature is the right person to have charge of young children."

Wan Yahya J (as he then was) in the case of *K Shanta Kumari v. Vijayan* [1986] 2 MLJ 216 also came up strongly in favour of mothers when he stated:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is obvious. An infant of tender age is by nature more physically and spiritually dependent on its own mother than anyone else.

Thus the rationale for the preponderance in favour of the mother is none others than their tender years does not warrant them to be deprived of the love care and devotion of their natural mother – *Re Ko (an infant)* [1990] 1 MLJ 495.

In arriving at the conclusion that the petitioner as the natural mother ought to be awarded the custody care and control of the two children of tender years I have considered and deliberated at length on the strenuous argument advanced by learned counsel for the respondent, En. Rafie Shazwan argued that the *status quo* should not be disturbed as the respondent has been having *defacto* control for the past three years and the son is progressing well at the kindergarten and happy in the present environment of staying with the respondent and his mother, and any interference may cause serious harm to the child, both emotionally and psychologically.

Though I have to admit that I cannot be oblivious to the *status quo* factor nevertheless it is only a factor which invariably falls subordinate to the factor of the welfare of the children. As was stated in *Bromley's Family Law* (7th edn) at p. 327:

> There can be little doubt that maintaining continuity of care is of overwhelming importance in deciding custody cases … . Nevertheless the *status quo* is only a factor and the Court may well think that the child's welfare in any particular case might be better served by being moved.

On the question of effect of change in environment it is pertinent to be reminded of the well known passage in the judgment of Eve J in *Re Thain* [1926] Ch 676 at p. 684:

> It is said that the little girl will be greatly distressed and upset at the parting from Mr. & Mrs. Jones. I can quite understand it may be so, but at her tender age, one knows from experience how mercifully transient are the effects of parting and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

It becomes abundantly clear that being subordinate to the welfare of the child the factor of uprooting from existing environment and its adverse effects cannot be given too much weight as the proper perspective that the court should adopt in the words of Edgar Joseph Jr. J (as his Lordship then was) at p. 499 in the case of *Re Ko (an infant)* [1990] 1 MLJ 495 is "whether the child should be deprived of the love, care and devotion of his natural mother, considering his tender age."

I would also add that there is no substitute to a natural mother's love, care and devotion for her children and in the context of the factual matrix herein the love and care of the grandmother would not be the same as that of the natural mother.

Incidentally by having both the children in one environment would foster a bonding relationship between the siblings and hence would contribute to and enhance their welfare.

For the reasons above I have no hesitation in awarding custody of both the children to the petitioner as prayed in prayer (b) of encl. 2 and I so order with reasonable access to the respondent to visit the children twice weekly during daytime for two hours each at the petitioner's residence and entitled to take the children every second and fourth Saturdays of every month at 1pm to spend the weekend with him and to return the children to the petitioner's residence on the Sunday following on or before 5pm.

I now come to the relief of maintenance as prayed in para. (c) of encl. 2 for both the petitioner and her two children. The provisions in the Act are clear as to the responsibility of the respondent to provide maintenance to the petitioner and her two children. Sections 77 and 93 thereof expressly empowers the court to order maintenance for the spouse and children respectively. The provision regulating assessment of maintenance is found in s. 78 of the Act which reads as follows:

> In determining the amount of any maintenance to be paid by a man by a woman to her husband or former husband, the Court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

Having established the respondents liability the quantum thereof has to be ascertained within the available evidence of the respondent's income. The only available evidence of the respondent monthly income is that of the respondent's evidence on oath. According to his evidence he is being paid on a daily basis as a rubber tapper and will only be paid if he is asked to tap rubber. His monthly income is between RM500 to RM600. Taking the respondents testimony as to his income at face value and taking into account the statutory factors for consideration as laid down in s. 78 of the Act I am of the view that a reasonable and appropriate amount for maintenance of the Petitioner and the two children would be RM400 a month commencing from 1 February 2002 with the further order that the parties are at liberty to apply for variation if the circumstances so warrants.